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The Court System on Trial in Turkey

I. INTRODUCTION

On February 15, 1999, Turkish officials arrested Abdullah Ocalan, former leader of the Workers' Party of Kurdistan (PKK).¹ Ocalan was expelled from Syria in October 1998.² He traveled to Greece, Russia, and Italy, seeking political asylum.³ Greek officials took him to Kenya, but his presence there was seen as a great security risk.⁴ Kenyan officials took Ocalan to the Nairobi airport, where he was arrested by Turkish officials and taken back to Turkey.⁵

On June 29, 1999, Ocalan was sentenced to death, for under his orders, the PKK "carried out several armed attacks, bomb attacks. . . and armed robberies" which caused the death of thousands of civilians and officers.⁶ Two years later, Turkey's Constitution was amended to limit the imposition of the death penalty to times of war, imminent threat of war, or acts of terrorism.⁷ Subsequently, Ocalan's sentence was commuted to life imprisonment.⁸ Ocalan appealed to the European Court of Human Rights (ECHR), alleging, among other things, a violation of his fair trial rights under an independent and impartial tribunal, as guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("Convention").⁹

This Note examines how the ECHR's decision in *Ocalan* and its analysis of the Convention properly recognized rights to a fair trial as fundamental human rights. The ECHR, however, also leaves

1. *Ocalan v. Turkey*, ¶¶ 8-12, (Eur. Ct. Hum. Rts., Mar. 12, 2003) at <http://www.echr.coe.int>.

2. *Id.* ¶ 9.

3. *Id.* ¶¶ 9-10.

4. *Id.* ¶¶ 9-11.

5. *Id.* ¶ 12.

6. *Id.* ¶ 42.

7. *Id.* ¶ 47.

8. *Id.*

9. *See id.* ¶ 3. *See also* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

unanswered several issues under fair trial rights. Part II presents the facts of Ocalan's case. Part III discusses the existing law controlling the analysis in *Ocalan*. Part IV examines the basis of the ECHR's holding in *Ocalan*. Part V critiques the lack of clarity in how similar future cases will be decided. Finally, Part VI considers the impact of *Ocalan* on future public policy in the international community.

II. FACTS OF THE OCALAN TRIAL

Upon his arrest, Ocalan was taken to Imrali Prison in Turkey.¹⁰ For nearly seven days, a prosecutor and a State Security Court judge questioned Ocalan without allowing him any legal assistance.¹¹ The first meeting between Ocalan and his lawyers took place while a judge and members of the security force were present; it was recorded and then given to the State Security Court.¹² Conversations between Ocalan and his lawyers were monitored and filmed.¹³ The number and length of visits by his lawyers were also restricted: after the first two visits, which were two weeks apart, contact was restricted to two hourly visits a week.¹⁴

Even access to the case file was restricted.¹⁵ Court hearings began just two weeks after Ocalan's lawyers spent eight days photocopying the 17,000 page file.¹⁶ Ocalan himself was not permitted access to his case file until a much later hearing.¹⁷

Meanwhile, the State Security Court was composed of two civilian judges and one military judge.¹⁸ On June 18, 1999, Turkey's Constitution was amended to exclude military members from state security courts.¹⁹ The military judge was then replaced with a third civilian judge, who had already read the file and transcripts and had followed all proceedings.²⁰ This replacement arrived just a week before the conviction and two months after court hearings began.²¹

10. *Ocalan*, ¶ 14, at <http://www.echr.coe.int>.

11. *Id.* ¶ 141.

12. *Id.* ¶ 23.

13. *Id.* ¶ 25.

14. *Id.* ¶ 152.

15. *Id.* ¶ 25.

16. *Id.* ¶ 165.

17. *Id.* ¶ 158.

18. *Id.* ¶ 34.

19. *See id.* ¶ 39.

20. *See id.* ¶ 40.

21. *See id.* ¶ 112.

Under the circumstances of Ocalan's pre-trial proceedings and the court's biased composition, the ECHR unanimously found that Turkey had violated his right to a fair trial by an independent and impartial tribunal.²²

III. LEGAL AND STATUTORY FRAMEWORK

The Council of Europe entered the Convention in consideration of the Universal Declaration of Human Rights (UDHR) and in pursuit of maintaining and furthering human rights.²³ The UDHR reaffirms the faith of the United Nations in fundamental human rights and proclaims a "common standard of achievement for all peoples and all nations" to respect the rights and freedoms enumerated in the declaration.²⁴

Article 6 of the Convention embodies fair trial rights.²⁵ Under Article 6(1), "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."²⁶ Article 6(3) provides, among other things, that "[e]veryone charged with a criminal offence" has the right "to have adequate time and facilities for the preparation of his defence...[and] to defend himself in person or through legal assistance of his own choosing."²⁷

A. Right to Independent and Impartial Tribunal

The ECHR established a standard in *Incal v. Turkey* for determining whether a court is independent and impartial within the meaning of Article 6(1).²⁸ Factors of independence include manner of appointment, term of office, any existing protections against outside pressures, and appearance of independence.²⁹ There are two tests for impartiality: (1) subjective impartiality, which analyzes the "personal conviction of a particular judge in a given case" and (2) objective impartiality, which "ascertain[s] whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect."³⁰

22. See *id.* ¶¶ 5-6.

23. European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 9, 213 U.N.T.S. at 222-224.

24. Universal Declaration of Human Rights, pmbl., G.A. Res. 217A, U.N. Doc. A/80 (1948) [hereinafter UDHR].

25. European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 9, art. 6, 213 U.N.T.S. at 228.

26. *Id.*

27. *Id.*

28. *Incal v. Turkey*, 1998-IV Eur. Ct. H.R. 1550.

29. *Id.* at 1571.

30. *Id.*

In *Incal*, a court composed of two civilian judges and a military judge convicted Ibrahim Incal for distributing separatist propaganda.³¹ The ECHR noted that Turkish law provided for judges to exercise their powers completely independent of any other governmental body;³² yet, because "military judges are accountable to their commanding officers," the status of military judges makes the courts' purported independence questionable.³³ The ECHR reasoned that the decisive factor in determining whether there is a legitimate fear that a court lacks independence or impartiality is whether the doubts of the accused are objectively justified.³⁴ The ECHR concluded that Incal could legitimately fear a lack of impartiality.³⁵ With one military judge on the tribunal, the Court "might allow itself to be unduly influenced by considerations which had nothing to do with the case," and thus, the ECHR found a violation of Article 6(1) of the Convention.³⁶

The ECHR reaffirmed *Incal* in *Ciraklar v. Turkey*.³⁷ Cengiz Ciraklar was arrested for holding an unauthorized demonstration with others.³⁸ The Izmir National Security Court, composed of two civilian judges and one military judge, convicted Ciraklar of participating in that demonstration and using violence against the police.³⁹ The *Ciraklar* majority followed *Incal* in making its ruling, holding that because one member of the court was a military judge, the fear that the court lacked independence and impartiality could be objectively justified; accordingly, Turkey violated Article 6(1).⁴⁰

B. Rights to Fair Trial Proceedings

Several ECHR cases deal with the extent of fair trial protections under Article 6(3). In *Kremzow v. Austria*, the ECHR considered what constitutes "adequate time and facilities" for preparing a defense under Article 6(3)(b).⁴¹ Here, three weeks was sufficient time to prepare a

31. *Id.* at 1552-54.

32. *See id.* at 1587.

33. *Id.* at 1587-88.

34. *Id.*

35. *Id.* at 1586.

36. *Id.* at 1587.

37. *Ciraklar v. Turkey*, 1998-VII Eur. Ct. H.R. 3060, 3071-74.

38. *Id.* at 3064.

39. *Id.* at 3064-65.

40. *Id.* at 3073-74.

41. *Kremzow v. Austria*, 268 Eur. Ct. H.R. (ser. A) 28, 41 (1994).

reply to a forty-nine page document and did not unfairly disadvantage the accused.⁴²

In *Magee v. United Kingdom*, Gerard Magee was denied legal assistance for over forty-eight hours, during which time he made incriminating statements.⁴³ The ECHR noted that the right to legal counsel at the initial stages of police interrogation is not explicitly stated in the Convention, and “may be subject to restriction for good cause.”⁴⁴ Thus, the central issue was whether the restriction deprived the accused of a fair hearing, in light of all proceedings.⁴⁵ The ECHR held that denying legal counsel for over forty-eight hours and holding the accused incommunicado during intensive questioning was not justified, and violates Article 6 rights.⁴⁶

Article 6(3) has also been construed to protect confidential attorney-client communications. For example, in *Brennan v. United Kingdom*,⁴⁷ Thomas John Brennan alleged that the United Kingdom violated his rights under Article 6(3)(c) because of an alleged breach of attorney-client confidentiality.⁴⁸ Brennan contended that a police officer was present within sight and hearing of his consultations with his lawyer, thereby destroying his attorney-client confidentiality.⁴⁹ The ECHR held that while an accused’s right to speak privately with his attorney out of hearing of a third person is a basic requirement of a fair trial, that right may be restricted for good cause, as stated in *Magee*.⁵⁰ Where there is no compelling reason for a restriction, even if done in good faith, the ECHR will find a violation of Article 6(3)(c).⁵¹ Similarly, in *Lanz v. Austria*, the ECHR found that surveillance of attorney-client contacts by the investigating judge violated the right to a fair trial under Article 6(3)(c).⁵² To justify such surveillance the government must give “very weighty reasons.”⁵³

42. *Id.* at 41-42.

43. *Magee v. United Kingdom*, 2000-IV Eur. Ct. H.R. 159, 172, 175-76.

44. *Id.* at 174.

45. *Id.*

46. *Id.* at 175-76.

47. 213 Eur. Ct. H.R. 232, 232 (2001).

48. *Id.*

49. *Id.*

50. *Id.* at 233.

51. *Id.* at 234, 235.

52. *Lanz v. Austria*, (Eur. Ct. Hum. Rts., Jan. 31, 2002) at <http://www.echr.coe.int>.

53. *Id.* ¶ 52.

IV. THE ECHR'S RATIONALE IN *OCALAN*

In *Ocalan v. Turkey*, the ECHR held that Turkey violated Ocalan's right to a fair trial under Article 6 of the Convention. Ocalan was not tried by an independent and impartial tribunal because of the composition of the court.⁵⁴ Ocalan's fair trial rights were also violated because he had restricted access to legal assistance, he was unable to communicate confidentially with his lawyers, and he had limited access to the case file.⁵⁵

A. *Trial Before a Military Judge*

The ECHR relied upon the standard in *Incal* to determine whether the state court in Ocalan was independent and impartial.⁵⁶ Under the *Incal* standard,⁵⁷ the State Security Court's independent and impartial depend upon whether defendant Ocalan had any legitimate reason to fear that the military judge's presence would cause the court to "be unduly influenced by considerations" irrelevant to the case.⁵⁸ Although the military judges had been replaced according to a constitutional amendment, and the State Security Court consisted of three civilian judges when Ocalan was actually convicted,⁵⁹ the ECHR held that this "last-minute replacement of the military judge," could not remedy the defect in the Court's composition. Most of the trial had already taken place with the military judge on the bench.⁶⁰ Moreover, the ECHR reasoned that with the high-profile nature of the case due to Ocalan's reputation,⁶¹ a military judge's presence could have only "raise[d] doubts in the accused's mind as to the independence and impartiality of the court."⁶² As a result, the ECHR concluded that the State Security Court was neither independent nor impartial, in violation of Article 6(1).⁶³

54. *Ocalan*, ¶ 169, at <http://www.echr.coe.int>.

55. *Id.* ¶ 169.

56. *Id.* ¶¶ 114-15.

57. See *Incal*, 1988-IV Eur. Ct. H.R. at 1571.

58. *Ocalan*, ¶ 114, at <http://www.echr.coe.int>.

59. *Id.* ¶ 117.

60. *Id.* ¶ 118.

61. Ocalan has been known as the founder and leader of the Worker's Party of Kurdistan (PKK), whose activities included organized armed attacks on major landowners and paramilitary preparations. Since 1984, the PKK has "carried on an armed struggle within Turkey." Ocalan told the ECHR that as the PKK's leader, decisions taken by the PKK were submitted to him for final approval. *Id.* ¶ 20.

62. *Id.* ¶ 120.

63. *Id.* ¶ 121.

B. Unfair Trial Proceedings

Next, the ECHR considered whether Ocalan was given a fair trial under Article 6(3). Article 6 normally requires the accused to receive legal assistance at the beginning of police interrogation.⁶⁴ Defendant Ocalan, however, was denied legal assistance for almost seven days, during which time he made self-incriminating statements.⁶⁵ Denial of legal access “for such a long period” was detrimental to the defendant’s rights.⁶⁶

As for attorney-client communication, the ECHR noted that Ocalan’s first visit from his attorneys were supervised and “within sight and hearing of members of the security forces and a judge.”⁶⁷ In subsequent meetings, prison officers were always present in an adjoining room with the door open, thus all meetings between Ocalan and his lawyers were within sight and hearing of third parties.⁶⁸ The ECHR stated that the right to communicate confidentially with legal counsel is “part of the basic requirements of a fair trial in a democratic society and follows from Article 6(3)(c).”⁶⁹ Confidential communication is necessary because surveillance causes legal assistance to “lose much of its usefulness.”⁷⁰ Thus, Ocalan’s inability to confer confidentially with his lawyers violated his rights under Article 6(3)(c).⁷¹

Another issue was whether the number and length of the meetings between Ocalan and his attorneys violated Article 6.⁷² Although Article 6(3)(c) provides a defendant with the right to defend himself in person or through legal assistance, the manner of exercising this right is unspecified.⁷³ As a result, it is left up to the states to ensure this right, and up to the courts to determine whether the method used is consistent with a fair trial.⁷⁴ Although the ECHR recognized the government’s security concerns in restricting the length of visits,⁷⁵ the limit of two

64. *Id.* ¶ 140.

65. *Id.* ¶ 141.

66. *Id.* ¶ 143.

67. *Id.* ¶ 144.

68. *Id.* ¶ 145.

69. *Id.* ¶ 146.

70. *Id.*

71. *Id.* ¶ 151.

72. *Id.* ¶¶ 152-57.

73. *Id.* ¶ 153.

74. *Id.*

75. The ECHR noted that the charges against Ocalan included “numerous acts of violence perpetrated by an illegal armed organization.” Also, Ocalan was charged as being the leader of

hourly visits a week is not easily justified, especially in light of the complexity and breadth of Ocalan's case.⁷⁶ With the lack of a sufficient justification for these restrictions, the ECHR found that the limits complicated effective preparation of Ocalan's defense, and violated his rights under Article 6.⁷⁷

The ECHR also looked at Ocalan and his lawyers' access to the voluminous case file.⁷⁸ Ocalan's attorneys could not provide him with a copy of the case file documents before hearings.⁷⁹ Given Ocalan's position in the PKK, he would have been the best person to assess the evidence and determine those individuals responsible for the violent acts.⁸⁰ Thus, his lack of access to any documents "compound[ed] the difficulties" in preparing his defense and violated his rights under Articles 6(1) and 6(3).⁸¹

V. CRITICAL ANALYSIS AND UNANSWERED QUESTIONS

The ECHR's decision in *Ocalan* represents an important step in ensuring fair trials for all defendants, regardless of their political status or notoriety. At the same time, however, the ECHR left some questions unanswered.

A. Right to an Independent and Impartial Tribunal

The ECHR correctly recognized that the presence of a military judge denied the defendant an independent and impartial tribunal. Yet *Ocalan* is distinguishable from *Incal* and *Ciraklar* by the fact that in *Ocalan*, a civilian judge replaced the military judge before the conviction. Most of the trial, however, had already taken place before the replacement.⁸² Thus, the ECHR expanded the rule from *Incal* and *Ciraklar* by holding that even though a military judge is replaced by a civilian judge before the end of trial, the presence of the military judge for most of the trial renders the tribunal neither independent nor impartial.⁸³ This conclusion is consistent with the provisions in Article

this organization and the "principal instigator of its acts." Given the nature of such charges, the ECHR understandably recognized the government's security concerns. *Id.* ¶ 154.

76. *Id.* ¶¶ 154-55.

77. *Id.* ¶ 157.

78. *Id.* ¶ 158.

79. *Id.*

80. *Id.* ¶ 161.

81. *Id.* ¶ 163.

82. *Id.* ¶ 118.

83. *Id.*

6. While Article 6 specifies that every accused holds the right to an independent and impartial tribunal, there is no designation as to which portion of trial proceedings the independent and impartial requirement applies.⁸⁴ The broad, open-ended language of Article 6, however, supports a fair and impartial trial in the entirety of the proceedings. Even though the Turkish court attempted to remedy the situation by having a third civilian judge on the bench,⁸⁵ an independent and impartial tribunal was necessary for the entire trial process.

It remains unclear, however, at what point in the trial proceedings, if any, such a replacement would render a tribunal independent and impartial. The ECHR only considered the situation at issue, where a civilian judge replaced a military judge near the end of trial.⁸⁶ Had the civilian judge come earlier in the trial, there may have been an independent and impartial tribunal, notwithstanding the initial presence of a military judge on the bench. Unfortunately, the ECHR failed to address whether any earlier replacement would have made the Turkish state court independent or impartial.

Related to this question is the extent of the judge's involvement in the trial. In *Ocalan*, the ECHR noted that before the military judge was replaced, the prosecution had already presented its entire case and two preliminary hearings and six main hearings had already taken place.⁸⁷ In short, the military judge had already participated in the bulk of the decisions made during trial.⁸⁸ While the third civilian judge had followed the trial from the beginning and attended all the hearings, he was not entitled to vote.⁸⁹ His involvement was minimal because of his observance with lack of influence. Because the third civilian judge did not take an active role in trial proceedings until the end, his participation for the remainder of the trial proceedings was essentially insubstantial because he could not make the Court independent and impartial.⁹⁰ It remains to be seen whether an entitlement to vote or being consulted by the three judges on the bench would have changed the outcome.

This possibility also raises the issue of whether or not a military judge could ever be deemed impartial, despite his connection to the

84. See European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 9, art. 6, 213 U.N.T.S. at 228.

85. *Ocalan*, ¶ 117, at <http://www.echr.coe.int>.

86. *Id.* ¶ 118.

87. *Id.*

88. *Id.*

89. *Id.* ¶ 117.

90. See *id.* ¶ 118.

state military. The *Ocalan* court implies a negative answer, stating that regardless of whether the military judge exerted influence over the other two civilian judges, it was the “very presence” of the military judge that made the tribunal neither independent nor impartial.⁹¹ In assessing whether members of the bench are independent, the ECHR disregards the factors laid out in *Incal*.⁹² The ECHR does not address whether there are any situations in which an independent tribunal may include a military judge.

The *Incal* Court determined that because of the manner of appointing military judges and their accountability to the strictures of the military system, they are inherently partial and cannot be objectively impartial on the bench.⁹³ This blanket application to all military judges, while seemingly accurate on its face, disregards the personal circumstances and status of each military judge. For example, the ECHR should take into account whether the judge seeks a renewal of his position on the tribunal, or how the judge has ruled in the past. These questions about the individual situation and qualities of a military judge affect the assessment of the independence or impartiality of a tribunal. These questions also suggest that there may be circumstances under which the presence of a military judge does not void *per se* the independent or impartial nature of a tribunal.

Another ambiguous standard is the accused’s legitimate cause to fear possible bias in a tribunal.⁹⁴ From *Incal* to *Ciraklar* to *Ocalan*, the assessment of what is a legitimate reason for doubting a tribunal’s independence and impartiality appears to be a case-by-case basis. There seems to be a trend for such a legitimate reason being recognized, however, in situations where a political or military conflict exists between the accused and the State. In *Incal*, the defendant was tried for distributing separatist propaganda.⁹⁵ In *Ciraklar*, the defendant was tried for holding an unauthorized demonstration, distributing separatist propaganda, and violently resisting the police.⁹⁶ In *Ocalan*, the defendant was a high profile defendant who had been involved in lengthy conflicts with Turkish military authorities.⁹⁷ In all of these situations, the accused was engaged in political or military conflicts

91. *Id.*

92. *Id.*

93. *See Incal*, 1988-IV Eur. Ct. H.R. at 1571.

94. *Ocalan*, ¶ 114, at <http://www.echr.coe.int>; *Incal*, 1988-IV Eur. Ct. H.R. at 1586-87.

95. *Incal*, 1988-IV Eur. Ct. H.R. at 1572-74.

96. *Ciraklar*, 1998-VII Eur. Ct. H.R. at 3064.

97. *Ocalan*, ¶ 120, at <http://www.echr.coe.int>.

with the government.⁹⁸ Under these circumstances, the ECHR consistently found that a military judge's presence caused legitimate doubt that the tribunal was independent or impartial.

B. Abridging the Right to a Fair Trial

Given the broad language of Article 6, the ECHR properly gave extensive protection to Ocalan's fair trial rights. The ECHR recognized, however, that the rights afforded to defendants are not absolute.⁹⁹ The ECHR has previously stated that rights "may be subject to restriction for good cause."¹⁰⁰ The issue in each case turns on whether the restriction "has deprived the accused of a fair hearing."¹⁰¹ Up to now, this determination has been made on a case-by-case basis; the ECHR has not specifically laid out what constitutes justified, legitimate restrictions on Article 6 rights. It may be desirable to leave this as a case-by-case analysis, for the Court would simply look at the restriction in each circumstance and determine whether it is justified. Yet, under this rubric, the ECHR would have to compare the restriction at issue with all the restrictions analyzed in past cases. This approach could easily lead to confusion and inconsistent holdings. Laying out a standard for analyzing what constitutes good cause restrictions would be more helpful to lawyers and judges, providing better guidelines for future cases.

In previous case law and in *Ocalan*, the ECHR only stated what kinds of justifications would not be legitimate restrictions. In *Magee*, the government delayed the defendant's access to a solicitor, during which time the "intimidating atmosphere [was] specifically devised to sap [the defendant's] will and make him confide in his interrogators."¹⁰² This delay in allowing access to legal assistance "irretrievably prejudiced" the defendant because during the forty-eight hours where he was denied legal assistance, he made incriminating statements that formed the basis for his eventual conviction.¹⁰³

Further, in *Brennan*, the government argued that the presence of a police inspector during the defendant's consultation with his solicitor

98. *Id.*

99. *Id.* ¶ 140.

100. See *Magee*, 2000-VI Eur. Ct. H.R. at 170. See also *Brennan*, 213 Eur. Ct. H.R. at 233; *Lanz*, ¶ 52, at <http://www.echr.coe.int>.

101. *Ocalan*, ¶ 140, at <http://www.echr.coe.int>.

102. *Magee*, 2000-VI Eur. Ct. H.R. at 161, 165.

103. *Id.* at 161, 175-76.

was justified.¹⁰⁴ There was purportedly a good reason for police presence because of a “risk of prejudice to the ongoing search for two other suspected persons.”¹⁰⁵ Moreover, “legal assistance could still be effectively given” with third parties present because the police here were unconnected with the case.¹⁰⁶ The ECHR disagreed, stating that while there was “no reason to doubt the good faith of the police” in mandating their presence, there was still “no compelling reason” for imposing such a restriction.¹⁰⁷ Although the officer was present at only one meeting, making this a “restriction. . . of very limited duration,” the ECHR still found that such presence would prevent the accused from candidly speaking with his solicitor.”¹⁰⁸ From *Brennan*, there is an underlying rule that the presence of any police during consultations between the accused and his attorney cannot have any legitimate justification.

Meetings between the accused and his attorneys were also under surveillance in *Lanz*.¹⁰⁹ The government in *Lanz* argued that surveillance was necessary to “ensure successful investigations” because without the judge’s presence in the beginning of the investigation, there was a risk that the contacts between the accused and his counsel would “lead to an interference with evidence.”¹¹⁰ The ECHR found that the government’s reasoning was not sufficient to justify surveillance.¹¹¹ In short, surveillance of attorney-client communications cannot be substantiated by reason of preventing interference with evidence.

Meanwhile, in *Ocalan*, the defendant was given restricted access to his counsel.¹¹² The ECHR concedes that holding Ocalan on the Island of Imrali was understandable, but “restricting visits [from his lawyers] to two hourly visits a week is less easily justified.”¹¹³ The ECHR further notes that the government did not provide any explanations to justify these restrictions.¹¹⁴ The ECHR does not indicate the extent of restrictions that would be legitimate, however, or what type of

104. *Brennan*, 213 Eur. Ct. H.R. at 213, 233.

105. *Id.*

106. *Id.*

107. *Id.* at 213, 234.

108. *Id.* at 213, 234-235.

109. *Lanz*, ¶ 49, at <http://www.echr.coe.int>.

110. *Id.* ¶ 49.

111. *Id.* ¶ 52.

112. *Ocalan*, ¶ 145-48, at <http://www.echr.coe.int>.

113. *Id.* ¶ 155.

114. *See id.* ¶ 155.

explanations would justify the restrictions in circumstances such as Ocalan's. One of the only indications of a restriction that was justified was the amount of time allotted for looking at the case file.¹¹⁵ In *Kremzow*, the ECHR determined that three weeks was sufficient for the defendant and his counsel to reply to a forty-nine page document.¹¹⁶ Here, Ocalan's counsel had only two weeks to review a 17,000 page case file; "coupled with other difficulties encountered by the defence," two weeks was insufficient time.¹¹⁷ In none of these cases, however, does the ECHR ever expressly state what is legitimate. Instead, the ECHR remains very fact-specific, providing minimal guidance about what restrictions or reasons would still ensure a fair trial for the accused.

Another term conveniently left undefined is "practical and effective rights," for the ECHR does not exactly explain what rights are encompassed here.¹¹⁸ The ECHR simply notes that the Convention was designed to guarantee "rights that are practical and effective."¹¹⁹ While the ECHR never explicitly defines practical and effective rights, it points to a broad standard of "the entirety of the domestic proceedings" in determining whether a fair trial has been achieved in accordance with Article 6.¹²⁰ This standard is flawed in the same manner as the standard for determining legitimate restrictions on rights. The focus on a fact-specific inquiry leaves too much room for ambiguity and a great potential for future inconsistent holdings.

The ECHR also considered "adequate time and facilities" under Article 6(3)(b).¹²¹ Article 6(3)(b) addresses whether the defendant had enough time and access to facilities or materials necessary to prepare a defense.¹²² The ECHR in *Ocalan* interpreted this provision to mean whether restrictions placed on the defense were so substantial and without legitimate justification as to render preparation unjustly difficult, in turn making it inadequate time and facilities.¹²³ In *Ocalan*, the defendant's access to his case file and the extent of communications

115. See *id.* ¶¶ 160-161.

116. *Kremzow*, 268 Eur. Ct. H.R. at 42.

117. *Ocalan*, ¶¶ 167-68, at <http://www.echr.coe.int>.

118. See *id.* ¶ 153.

119. *Id.*

120. *Id.*

121. *Id.* ¶ 123.

122. European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 9, art. 6, 213 U.N.T.S. at 228.

123. See *Ocalan*, ¶ 123, at <http://www.echr.coe.int>.

with his lawyers are encompassed under this provision.¹²⁴ The *Ocalan* Court found a violation of Article 6(3)(b) in the restrictions placed upon the number and length of visits between defendant and his lawyers.¹²⁵ Imposing such restrictions was "one of the factors which made the preparation of [Ocalan's] defence difficult and contrary" to Article 6.¹²⁶ The ECHR also concluded that Article 6(3)(b) was breached because of the limited access to the case file.¹²⁷ Ocalan and his attorneys' inability to gain full, direct access to the case file early on in trial proceedings increased the difficulties encountered in preparing the defense.¹²⁸

The substantial difficulties Ocalan and his attorneys encountered violated Ocalan's fair trial rights.¹²⁹ Where circumstances compound difficulties in the ability to prepare one's defense, especially where the obstacles result from government-imposed restrictions, the ECHR will consider that the guarantee of "adequate time and facilities" to prepare for trial has been breached.¹³⁰

VI. FUTURE PUBLIC POLICY CONSIDERATIONS

A. Impact of Ocalan on the International Community

The ECHR's ruling will have definite ramifications throughout the international community. It reinforces human rights principles by recognizing the significance of fair trial rights as part of every individual's fundamental human rights. Affording a defendant access to legal counsel and an independent and impartial tribunal contributes to ensuring a fair trial and giving legitimacy to a state's judicial proceedings.

The *Ocalan* ruling and the fair trial standards set forth are directly applicable to the current controversy at Guantanamo Bay, especially regarding the United States' policy decision regarding the detainees held there. The large-scale arrests of "unlawful combatants" and their confinement at Guantanamo have brought the United States under close international scrutiny, focusing on how the United States is flouting its legal obligations to afford detainees their rights under the Geneva

124. *Id.* ¶ 152-69.

125. *Id.* ¶ 157.

126. *Id.*

127. *Id.* ¶ 163, 168.

128. *Id.*

129. *Id.* ¶ 169.

130. *See id.*

Conventions,¹³¹ including those rights upheld in *Ocalan*. The United States has “imprisoned hundreds of terrorist suspects. . .for well over a year.”¹³² None have been brought before a judge.¹³³ None have been given access to a defense lawyer.¹³⁴ None have been charged, and none have been tried.”¹³⁵ While being denied legal counsel, detainees are reportedly being subjected to extensive interrogations.¹³⁶ Moreover, possible trials would be held before military tribunals, which have lowered standards of evidence.¹³⁷

Where Turkey was bound to uphold its legal obligations under the Convention, the United States should likewise be bound to its obligations under the Geneva Conventions.¹³⁸ Unlike Turkey, however, who was ultimately forced to recognize Ocalan’s fair trial rights, the United States continues to breach its obligations under the Geneva Conventions through semantics, labeling the detainees “unlawful combatants” rather than “prisoners of war.”¹³⁹ The main controversy at issue is whether, under an “unlawful combatants” label, the United States must adhere to the Third and Fourth Geneva Conventions.¹⁴⁰ The Third Geneva Convention guarantees prisoners of war (POW) certain rights, while the Fourth Geneva Convention protects persons “taken into enemy custody during an armed conflict.”¹⁴¹ As “unlawful combatants,” Guantanamo detainees stand in limbo between these two Geneva Conventions, receiving the rights of neither POWs nor civilians.¹⁴² In spite of this uncertain status, unlawful combatants do not lack all rights.¹⁴³ Under Article 4 of the Fourth Geneva Convention, persons are

131. See Erin Chlopak, *Dealing with the Detainees at Guantanamo Bay: Humanitarian and Human Rights Obligations Under the Geneva Conventions*, 9 HUM. RTS. BR. 6, 6 (2002).

132. Douglass W. Cassel, Jr., *A Tale of Two Countries*, CHIC. DAILY L. BULL., May 1, 2003, at 6.

133. *Id.*

134. *Id.*

135. *Id.*

136. AMNESTY INTERNATIONAL, THE THREAT OF A BAD EXAMPLE: UNDERMINING INT’L STANDARDS AS “WAR ON TERROR” DETENTIONS CONTINUE 17 (Aug. 2003), available at <http://web.amnesty.org/library>.

137. *Id.*

138. See generally Third Geneva Convention Relative to the Treatment of Prisoners of War, done on August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, done on August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

139. See Chlopak, *supra* note 131, at 6.

140. *Id.*

141. *Id.*

142. *Id.* at 7.

143. *Id.*

given broad protections, where such persons come into the hands of a Party to a conflict of which they are not nationals.¹⁴⁴

The policy of broadly interpreting rights in order to extend them to all persons captured during an armed conflict is consistent with the broad interpretation of fair trial rights recognized in *Ocalan*. Even under the "unlawful combatants" label, the United States is obligated to place detainees in front of a competent tribunal to determine each individual's status before conveniently applying a blanket label to all detainees and denying them their rights. Moreover, the United States cannot hide behind the label "war on terrorism" to deny rights to the detainees. This is clear from *Ocalan*. Putting *Ocalan*, a Kurd leader, on trial can be seen as fighting terrorism in Turkey and the Middle East, and the ECHR's "judgment constitutes an important step to set the legal frame for measures. . . taken in the 'war on terrorism.'"¹⁴⁵ The U.S. claim of a war on terrorism thus holds no sway in denying rights to the detainees. The United States must follow the legal rules to which it has obligated itself, and act consistently with the *Ocalan* ruling by affording all detainees the rights provided under the Geneva Conventions.

B. The Political Impact of *Ocalan*

Ocalan's case also hits a sore point between Turkey and the European Union. Human rights abuses in Turkey has been a predominate obstacle in Turkey's candidacy for membership in the European Union.¹⁴⁶ Turkey has lobbied to join the EU for years, but "its human rights record has been a persistent sticking point."¹⁴⁷ Under pressure from the EU to improve its human rights record and in its efforts to become an EU member, Turkey abolished the death penalty to bring its laws into conformity with EU requirements.¹⁴⁸ This amendment occurred after *Ocalan's* initial death sentence; after the law changed, his punishment was commuted to life imprisonment in October 2002.¹⁴⁹ Although Turkey made this important change in its laws, the ECHR's ruling in *Ocalan* highlights questionable human rights practices in Turkey that have contributed to curbing the

144. *Id.* at 6, 7.

145. Florian Hauswiesner, *What is the Legal Fight Against Terrorism?: The Case of Ocalan v. Turkey Decided by the European Court for Human Rights*, 19 INT'L ENFORCEMENT L. RPTR 222, 224 (2003).

146. Frank Bruni, *Court Faults Turkish Trial of a Kurd*, N.Y. TIMES, Mar. 13, 2003, at A8.

147. *Id.*

148. Bruni, *supra* note 146, at A8.

149. *Ocalan*, ¶ 47, at <http://www.echr.coe.int>.

realization of Turkey's EU membership. If Turkey took the ECHR's decision as an opportunity to correct its human rights record, it may help to show the state's commitment to bringing itself in line with human rights norms, and shed a brighter light on its candidacy to the EU.

Instead, Turkey has appealed the decision to the Grand Chamber of the ECHR, which has the quality of an appeals court.¹⁵⁰ On June 12, 2003, Turkey officially rejected the ECHR's decision in *Ocalan* that Ocalan was not judged fairly.¹⁵¹ The Foreign Ministry stated that Turkey would appeal because the "grounds for decision and the results related to this are far from sound."¹⁵²

Turkey's appeal of the *Ocalan* decision will do little to help its bid for EU membership. If the Grand Chamber of the ECHR finds again for Ocalan and rules that Turkey's trial was unfair, Turkey will have to reexamine its human rights practices and change its ways before it can hope to win a seat in the EU. As one commentator noted, "[i]f the court upholds its earlier decision and Turkey refuses to accept it, the Ocalan case will be marked down by EU officials as another 'human rights violation' against Turkey when its application for EU membership is reviewed."¹⁵³ Certainly, Turkey's refusal to recognize the ECHR's decision in *Ocalan* and change its practices accordingly will undercut its chances of gaining EU membership.

C. Conclusion

The ECHR's decision in *Ocalan* signifies an important step in upholding the legitimacy of justice systems and guaranteed rights under international human rights treaties. The ECHR, however, leaves some issue unresolved. The ECHR does not determine at what point in trial proceedings, if any, could replacing a military judge with a civilian judge render a tribunal independent and impartial. Also, the ECHR never reaches the issue of whether a military judge could ever be deemed independent and impartial. While the ECHR uses several standards to determine whether Ocalan's rights were violated, these standards are ambiguous. They are never fully defined, but appear to be

150. *Turkey Appeals Against European Court Ruling on Rebel Kurd's Trial*, BBC WORLDWIDE MONITORING, Jun. 12, 2003, available at LEXIS, News Library, BBMIR File.

151. *Id.*

152. Gilbert Reilhac, *Turkey Held Unfair Trial for Kurd Leader*, CHI. TRIB., Mar. 13, 2003, at C3.

153. Eral Yilmaz, *European Court of Human Rights to Review PKK Leader's Case*, WORLD MARKETS ANALYSIS, Jul. 15, 2003, available at LEXIS, News Library, WMRCNW File.

applied on a case-by-case basis, such as a “legitimate cause to fear” that the tribunal is biased, good cause restrictions against an accused’s fair trial rights, and “practical and effective rights.”

Despite some of the Court’s inconclusive holdings, *Ocalan* reaffirms the inviolability of human rights and reaffirms State obligations under international treaties. For the United States, *Ocalan* strengthens the opposition against U.S. actions in Guantanamo, for the United States denies what *Ocalan* upholds—fair trial rights and obligations under human rights treaties. By denying these rights, the United States is “systematically evading application of domestic and international law.”¹⁵⁴ Consequently, the United States would “fail to inspire confidence in democratic societies” or anywhere for that matter.¹⁵⁵ To regain this confidence and uphold human rights, it is imperative that the United States bow to its obligations under the Geneva Conventions. Otherwise, the so-called democracy of America is no better than an authoritarian state such as Turkey.

For Turkey’s political ambitions, *Ocalan* affect its chances of joining the EU. By accepting the ECHR’s decision and reforming State practices, Turkey may have a greater opportunity for gaining the much coveted EU membership. By challenging the ECHR’s decision, Turkey may find itself making membership even more difficult and out of reach. The foremost priority of Turkey, and every other state, is to ensure the fundamental human rights of every individual. When Turkey’s court system was put on trial, the ECHR found that human rights, particularly fair trial rights, were of utmost importance and obligatory upon every party to the Convention.

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154. AMNESTY INT’L, *supra* note 136, at 28.

155. Cassel, *supra* note 132, at 6.

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